IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

RSA.No. 767 of 2006()

(O.S.28/99 OF SUB COURT, NEYYATTINKARA)
(A.S.166/00 OF 1ST ADDL. DISTRICT COURT, TVM)

APPELLANT/APPELLANT/DEFENDANT NO.1:

PATHUMMAL BEEVI NABISA BEEVI,
KARIM FANCY STORE, BALARAMAPURAM,
VIZHINJAM ROAD, ZAKIR MANZIL, THALAYIL DESOM,
ATHIYANNOOR PAKUTHI.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS/RESPONDENTS/PLAINTIFF & DEF. NOS.2 & 3::
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1. MOHAMMED ALI ABDUL JABBAR,
KARIYANCHIRATHOPPU PUTHEN VEEDU,
VENGANOOR DESOM AND VILLAGE, REPRESENTED
BY HIS POWER OF ATTORNEY HOLDER, ABDUL SAMAD,
ABDUL ELAH, SAMAD COTTAGE, VADAKKEVILA, PALLICHAL
DESOM AND VILLAGE.

2. ABDUL RASHID, KARIM FANCY STORE,
BALARAMAPURAM, VIZHINJAM ROAD.

3. NAZEEM, D/O.FATHIMA BEEVI,
SOJA MANZIL, ALASSARI WARD, ALAPPUZHA.

R1 BY ADV. SRI.G.S.REGHUNATH(CAVEATOR)
R2 BY ADV.SRI.P.S.PRADEEP

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J

R.S.A.No.767 OF 2006

Dated this the 5th day of December, 2006

JUDGMENT

1. The first defendant in a suit for eviction is the appellant in this second appeal. The suit was filed on the assertion that the first defendant is the tenant of the premises under the plaintiff as per Ext.B23. First defendant, however, set up a case that the tenant of the premises is her husband, that too under Ext.B1 and the landlord is not the plaintiff, but the person who got impleaded as additional third defendant, later on.

2. In the meanwhile, O.S.No.165/94, filed by the additional third defendant for partition, was also pending before the trial court. Under such circumstances, obviously prompted by the parties, the trial court jointly tried both the suits, dismissed O.S.165/94 filed by the third defendant for partition; denounced the plea of the first defendant that the tenant of the premises was her husband, that too under Ext.B1; upheld Ext.B23 and ordered eviction, also finding title to the property

in the plaintiff in O.S.28/99, from which, this second appeal arises.

3. Considering the first appeal of the first defendant, the lower appellant court took the view that having regard to the intricate connection between the matters and the fact that the two suits were jointly tried and disposed of, the absence of any appeal from the decree in O.S.165/94 has given the decree in that case such finality that it would operate as res judicata to the consideration of the appeal arising from O.S.28/99. Taking such view, the first appeal by the first defendant was dismissed.

4. Learned counsel for the appellant urged that the first defendant's first appeal could not have been dismissed on count of res judicata because she was not a party to O.S.165/94. But then, it is a matter of record that the plaintiff in O.S.165/94 joined O.S.28/99 and therefore, the defence of the first defendant in O.S.28/99 that it is not she, but her

husband who is a tenant of the premises, that too in terms of Ext.B1 under the additional third defendant, is a matter that was directly and substantially in issue in O.S.28/99, from which, this second appeal arises. Such question was also directly and substantially in issue in O.S.165/94 filed by the additional third defendant seeking partition on the strength of title, wherein, the finding of the trial court was that the additional third defendant, the plaintiff in O.S.165/94, did not have title to claim partition. The principle of res judicata does not always depend upon identity of the parties to the lis. It rests fundamentally on the identity of title on which the questions are considered.

5. It is then urged that O.S.165/94 cannot be treated as a former suit qua O.S.28/99 when both were jointly tried and disposed of. But then, res judicata that has been found is not in the court of first instance, but in the court of first appeal, while considering the appeal against the decree in O.S.28/99. There was no appeal challenging the decree in O.S.165/94. This

position needs no further elaboration in view of the repeated decisions of the Full Bench of this Court, including the decision in **Janardhanan Pillai** v. **Kochunarayani Amma** [1976 KLT 279 (FB)]. In fact, the principle is that when one stands up to urge a first appeal before the superior court, finality of the connected decree as attained at the hands of the first instance will stare at him.

6. That apart, the content of Section 96 and the scope of appeal that it offers enables a person aggrieved to seek leave of the appellate court to entertain an appeal against the decree of which he may be aggrieved. It is not alien to the practice and procedure of the superior courts of this land that such leave is often sought for and granted as and when found necessary. Under such circumstances, the appellant/first defendant in O.S.28/99 cannot plead disability to challenge the decree in O.S.165/94.

7. However, the finding rendered by the first appellate court on

the question of res judicata is not being considered as a ground to sustain the said verdict. This is so because, having heard learned counsel for the appellant/first defendant and the contesting respondents, I deem it appropriate to enter on the contentions of the parties on the merits, touching the identity of the lease under which, the parties stand.

8. Ext.B23 is a counter lease shown to have been executed by the first defendant in favour of the plaintiff. The plaintiff gave evidence as DW5. Ext.B23 was produced from the custody of the plaintiff. DW4 is the scribe of Ext.B23. He gave evidence, including of having witnessed the execution of Ext.B23 by the first defendant. The trial court was urged to make a comparison between the signatures that appear in Ext.B23 and those at the foot of the deposition of the first defendant as DW2. The trial court found that though there are some variations, it was not prepared to swallow the suggestion. I am of the view that prudence had prevailed on the trial court since comparison of the signature in Ext.B23 could not have

been done with the aid of the subsequent signature. The contesting first respondent had also not offered any prior document for comparison of signature.

9. Again, the defence set up by the first defendant on the basis of Ext.B23 need not rest repelled on the comparison of signatures. One of the crucial elements that would corroborate the version of DW4 that the first defendant had executed Ext.B23 regarding the existence of the lease is that inspite of nearly three months between Ext.B32 suit notice and the filing of the suit, the first defendant did not respond to the said suit notice. No reply was sent. Going by the common course of human conduct, if one were to take the stand that it is not she, but her husband, who is the tenant of a commercial premises, that too of a person other than the person claiming to be the landlord, the immediate reaction would be to denounce any claim in that regard. One would expect a prompt reply to Ext.B23.

10.I do not find any legal infirmity in the appreciation of evidence by the trial court warranting interference, even if this Court were to treat this as a first appeal under Section 96 of the Code of Civil Procedure. Having regard to the entire materials on record, to which reference have been made during the course of arguments, I do not find that the verdict of the trial court is wrong either in law or on facts. The appreciation of evidence is not only in accordance with law but is the most reasonable approach and cannot be faulted at all.

11. Learned counsel for the appellant, as a last resort, urged that the first appeal from O.S.165/94 filed by the additional third respondent, who is the plaintiff in that suit, is pending before the lower appellate court with an application to condone delay and that therefore, this second appeal requires to be entertained to consider whether the matter is to be remanded for reconsideration along with that appeal. The question as to title in O.S.165/94 is not to affect any claim of the appellant herein. This is because, in answer to O.S.28/99,

in which the plaintiff pleaded that the first defendant is the tenant, no rival title is pleaded by the first defendant herself. All that she claims is that it is not she, but her husband, who is the tenant and the landlord is the third defendant. Therefore, the case of the first defendant in O.S.28/99 could not improve the final outcome of O.S.165/94, what ever that be. That apart, neither this judgment, nor the judgment of the first appellate court may conclude the issues between the plaintiff and the third defendant in O.S.28/99 as to their rival claims to title to property. Thus, even in that view of the matter, I do not find any ground to entertain this second appeal.

12. On this second appeal failing, learned counsel for the appellant urged that the appellant may be granted reasonable time to vacate. The court below has upheld Ext.B23, the monthly rent fixed therein was Rs.320/-. While confirming the decree and dismissing the appeal, it is directed that if the appellant files an affidavit before the execution court within a period of three weeks, undertaking to vacate the premises

within a period of six months from today and to pay occupational charges from today, at the rate of Rs.500/- per month and continues to make such payment, she shall not be dispossessed for the said period of six months. This will, however, be on further condition that the entire arrears of rent, as found by the courts below, will be deposited, if not already paid, within a period of three weeks from today. It is clarified that if the undertaking as aforesaid is not filed in time or if any condition as to deposit as aforesaid is not satisfied, the appellant will be liable to be dispossessed forthwith. The second appeal is dismissed, subject to the above.

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.